

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Date Issued: September 28, 2001

BALCA Case No. 2000-INA-98
ETA Case No. P1999-PA-03321872

In the Matter of:

RYSZARD KOCIUBA,
Employer,

on behalf of

BOZENA DEBEK,
Alien.

Appearance: Andrew J. Olshevski, Esquire,
Brooklyn, New York

Before: Chapman, Vittone and Wood
Administrative Law Judges

DECISION AND ORDER

PER CURIAM. This case arises from an application for labor certification¹ filed by Ryszard Kociuba for the position of Household Cook. (AF 33-34).² The following decision is based on the record upon which the Certifying Officer (CO) denied certification and Employer's request for review, as contained in the Appeal File ("AF"), and any written argument of the parties. §656.27(c).

STATEMENT OF THE CASE

On December 30, 1997, Employer, Ryszard Kociuba, filed an application for alien

¹ Alien labor certification is governed by section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. § 1182(a)(5)(A) and 20 C.F.R. Part 656.

² "AF" is an abbreviation for "Appeal File."

employment certification on behalf of the Alien, Bozena Debek, to fill the position of Household Cook. The job to be performed was described as follows:

Prepare and cook family style, Polish and non-meat cuisine foods such as: golabki, pierogi, barszcz, zrazy, kotlety. Serve meals. Assist the owner of the residence in menu preparation and purchasing foodstuffs. Check foodstuffs for quantity and quality. Cook foodstuffs in quantities according to the number of guest and as suitable for occasion. Plan and follow sequence of cooking operations with meal serving hours and daily menu. Prepare hot and cold meals for cocktail parties and family/business gatherings. Prepare preserves, jellies, cakes and pastry. Wash kitchen utensils and dishes.

Total hours of employment were listed as 40 hours per week, from 8:00 a.m. to 4:00 p.m., with no overtime. Minimum requirements for the position were listed as a High School diploma and two years experience in the job offered.

Employer received no applicant referrals in response to its recruitment efforts. (AF 38-41).

A Notice of Findings (NOF) was issued by the CO on October 13, 1999, questioning the existence of a *bona fide* job opportunity open to any U.S. worker. (AF 29-31). The CO noted that under immigration law, the number of immigrant visas available to "unskilled workers" (those occupations requiring less than two years experience) is very limited, whereas, there is no current waiting period for most immigrant visas in the "skilled worker" category (at least two years experience). Because the occupation of Domestic Cook can require one to two years for proficiency, it is considered to be a "skilled worker" under the immigration law. The CO observed that the application contained insufficient information to determine whether the position of Domestic Cook actually exists in Employer's household or whether the job has been created solely for the purpose of qualifying the alien as a skilled worker under current immigration law. Thus, Employer was instructed to explain and provide documentation of a bona fide job opportunity. Rebuttal evidence, at a minimum, was to include responses to twelve enumerated questions including documentation where appropriate.

In Rebuttal, Employer responded to each of the twelve questions. Employer stated that the Alien would be involved in cooking for family members for 21 hours and 15 minutes per week, in food shopping for approximately 7-10 hours per week and dishwashing for 4 hours per week. Employer indicated that both adults work outside the home on a daily basis and that an immediate family member attends to the two children - ages 7 and 6 months, when Ms. Kociuba is not home; and that Ms. Kociuba and family members, not the Alien, perform all housecleaning duties. Employer stated that the family entertains frequently on both social and business occasions.

A Final Determination denying labor certification was issued by the CO on November 23, 1999, based upon a finding that Employer had failed to adequately document that a *bona fide* position for a Domestic Cook in his household actually exists. (AF 11-13). The CO concluded that "the

evidence shows that it is more likely that the alien will be employed as a General Houseworker than a Domestic Cook". The CO further commented:

There is no evidence that your family entertains frequently or that the alien will be involved on a full-time basis preparing meals for family members to consume. Most family members are outside the home working or attending school for the greater part of the alien's daily work schedule. Consequently, while the alien may cook some meals, it is implausible that the alien will be engaged as a full-time Domestic Cook because there is no one at home to eat most of the meals that the alien supposedly will prepare and serve.

Even though you have stated that Ms. Kociuba and a relative will care for your younger child, it seems apparent that the household employee (the "cook") must also be involved in child care when no one else is available. There are no other domestics employed in the household. Your response to the child care question indicates that relatives who apparently do not reside in the household will care for the children when the parents are employed outside the home. According to your rebuttal, the parents work outside the home every day of the week. The children require care every day of the week. We find it implausible that the alien, who is present at the home every day, would not be involved in caring for the children, while relatives who do not reside in the home would care for the children on a daily basis.

Similarly, we also find implausible your statement regarding the performance of housework. While you stated that housecleaning duties will be performed by Ms. Kociuba who is employed outside the home and other family members who do not reside at the home, it seems apparent that the alien who is on the premises every day must be involved in housecleaning during the week. It is not plausible that the alien will be occupied solely in preparing meals for family members who are not there to eat them.

Employer filed a Request for Administrative-Judicial Review on December 20, 1999, contending that the CO had denied labor certification for reasons based entirely on speculative presumptions, including "the CO's personal opinions, suspicions, and views which resulted in a clearly biased method of review". (AF 1-10). The matter was then referred to this office on January 10, 2000.

DISCUSSION

Twenty CFR 656.20(c)(8) requires that the employer offer a *bona fide* job opportunity. *Carlos Uy III*, 1997-INA-304 (Mar. 3, 1999) (*en banc*). Whether a job opportunity is *bona fide* is gauged by a "totality of the circumstances" test. *Id.* When an employer presents a labor certification application for a domestic cook, attention immediately focuses on whether the application presents a *bona fide* job opportunity because common experience suggests that few households retain an

employee whose only duties are to cook, or could even afford the luxury of retaining such an employee. *Id.* Moreover, the burden of proving that the offered job is a *bona fide* job opportunity and specifically full-time employment is on the employer. *Id.*, citing *Gerata Systems America, Inc.*, 1988-INA-344 (Dec. 16, 1988)(*en banc*).

Employer was instructed in the NOF to document why the position of Domestic Cook in his household should be considered a *bona fide* job opportunity rather than a job opportunity that was created solely for the purpose of qualifying the Alien as a "skilled worker". Specifically, Employer was instructed to provide responses to 12 questions, and was further advised:

Your responses, documentary evidence, and all other relevant factors, will be evaluated to determine whether the position of Domestic Cook actually exists in your household. The adequacy of the documentation will be key to the evaluation of your application because little weight will be accorded to conclusory statements. Merely answering all the questions does not insure approval of the application.

In denying certification, the CO found Employer's rebuttal evidence insufficient to establish the position of Domestic Cook as a *bona fide* job opportunity in Employer's household. We concur. Employer indicated that the Alien would be involved in cooking for family members for 21 hours and 15 minutes, and in food shopping for approximately 7-10 hours per week, and dishwashing for 4 hours per week, for a total of approximately 35 hours per week. Employer also indicated that both parents work outside the home on a daily basis, that a 7-year old attends school from 9 a.m. to 2 p.m. and that a six month old child stays at home. Employer further stated that he employs no other domestic help and that all child care duties and housecleaning are performed by either Mrs. Kociuba (who works outside the home for 6 hours per day) or by unidentified family members. Employer's responses to the CO's questions regarding child care are general in nature and do not provide adequate information to determine that there is adequate care for the children by someone other than the Alien while the parents are out of the home.

Moreover, the Alien's work schedule, as listed on Form ETA 750, is from 8 a.m. to 4 p.m. with no overtime. As was noted by the CO, most family members are outside the home working or attending school for the greater part of the Alien's daily work schedule. Consequently, while the Alien may cook some meals, it is implausible that the Alien will be engaged as a full-time Domestic Cook because there is no one at home to eat most of the meals that the Alien supposedly will prepare and serve.

Employer has indicated that the household "entertains frequently, and that includes both social and family occasions, as well as business-related meetings, and cocktail parties". Employer, however, has provided no documentation whatsoever to support this assertion, despite the CO's specific instructions to document in detail its entertainment calendar.³ Employer's application, which indicates

³ Employer justifies his lack of documentation by stating that the CO has requested documentation of social events three years prior, however, it is noted that Employer has provided

the Alien leaves at 4 p.m. each day and that no overtime is required, would not appear to support this assertion.

Taken as a whole, and in light of the Employer's burden of proof to document eligibility for labor certification, we find Employer has not adequately documented that the position of Domestic Cook is a *bona fide* job opportunity that actually exists in Employer's household. Having found the record inadequate to support such a finding, we affirm the CO's denial of labor certification.

ORDER

The Certifying Officer's denial of labor certification is hereby **AFFIRMED**.

SO ORDERED.

Entered at the direction of the panel by:

Todd R. Smyth
Secretary to the Board of
Alien Labor Certification Appeals

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

**Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, N.W.
Suite 400
Washington, D.C. 20001-8002**

Copies of the petition must also be served on other parties and should be accompanied by a written

no documentation whatsoever of any type of entertaining which would require the Domestic Cook's services.

statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced pages. Upon the granting of a petition the Board may order briefs.